Proceedings by lawyer for recovery of money amounts to a commercial relationship under Section 44 ACA. (Delhi High Court)

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Spentex Industries Ltd. v. Quinn Emanuel Urquhart & Sullivan LLP

Court: High Court of Delhi | **Case Number**: CS (OS) 568 of 2017 | **Citation**: MANU/DE/1032/2020 | **Judge**: Jayant Nath J | **Date**: 12 May 2020

A. The background

Spentex Industries, an Indian company, had engaged the New York offices of the law firm Quinn Emanuel Urquhart & Sullivan LLP for legal services for a potential investment arbitration against the Republic of Uzbekistan. Spentex and one of its Dutch subsidiaries signed an engagement letter with the firm. The engagement letter had an arbitration clause. Dispute arose later concerning Quinn's fees. Quinn initiated arbitration under the arbitration rules of Judicial Arbitration and Mediation Services, Inc. (JAMS) and JAMS gave notice of a tripartite arbitration.

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Spentex filed a suit in the Delhi High Court in October 2017 praying that the engagement letter and its arbitration clause be declared as void, inoperative, incapable of being performed, and against the public policy of India. It also sought an interim prayer. Quinn moved an application under Section 45 ACA read with Order VII Rule 11, CPC to refer the matter to the ongoing arbitration and reject the plaint.

A decision on Spentex's interim prayer had yet to come but on 13 December 2018, an award had been passed in Quinn's favour.[1] Spentex submitted that the prayer in the suit continued to survive. The court then heard Quinn's application to refer the matter to arbitration on a few dates from December 2018 through March 2019. It eventually concluded that Quinn's request should succeed, and it rejected the plaint. Since the arbitration proceedings had ended by this time and an award made, there was no need for a reference.

B. The decision

The court examined two main issues.

It is not clear from the judgment as to who raised the question of maintainability– whether the court, Quinn or Spentex itself- but the first question was whether an (anti-arbitration) suit was maintainable to declare that an arbitration agreement was null and void?[2]

Then, secondly, if the suit was maintainable, was the arbitration agreement null and void, inoperative or incapable of being performed?

B1. Maintainability of an Anti-arbitration Suit

Jayant Nath J first reproduced two passages—paragraphs 22 and 23– from *World Sport Group (Mauritius)*

[1] Order dated 13 December 2018 on Delhi High Court's website [CS (OS) No. 568 of 2017].

[2] These suits are anti-arbitration suits. Almost always in such a lawsuit, a declaration that the arbitration agreement is null and void will be coupled with a prayer for permanent injunction (and temporary injunction as an interim measure) to restrain the arbitration proceedings. The relief of injunction granted in such lawsuits are called anti-arbitration injunction.

Ltd. v. *MSM Satellite (Singapore) PTE Ltd*., (2014) 11 SCC 639, a 2-judge bench decision of the Supreme Court of India (AK Patanaik and FM Ibrahim Kalifulla JJ). These two passages are to the effect that under Section 9 of the Code of Civil Procedure, 1908 ("CPC") courts in India have the jurisdiction to try any suit unless explicitly or impliedly barred. Even if a foreign court has jurisdiction under the parties' agreement to grant equitable reliefs, jurisdiction under Section CPC of Indian courts cannot be ousted, even on the principle of judicial comity.

Then he reproduced two passages—paragraphs 43 and 46–from *Sasan Power Ltd.* v. *North American Coal Corpn.* (India) (P) Ltd., (2016) 10 SCC 813, another - judge bench decision of the Supreme Court of India (Jasti Chelameswar and Abhay Manohar Sapre JJ). These passages conclude that a judicial authority seized of a matter in respect of which there is an arbitration agreement, is precluded by Sections 8 and 45 ACA (whichever applies) to hear the matter, subject to the conditions stipulated under those sections being met. Also, Section 45 ACA permits an enquiry into the question whether the arbitration agreement is null and void, inoperative and incapable of being performed.

Then, Nath J said, "it would follow from the above that a suit would be maintainable for a limited purpose." He elaborated the "limited purpose" to be "an enquiry as to whether the Arbitration Agreement is null and void, inoperative and incapable of being performed."

Then he said that the "legal position in this context may be noted" and cited four more passages each from *MSM* and *Sasan*.

Then Nath J said that a "reference may be had to the judgment of a Coordinate Bench of this court" in *Clearwater Capital Partners (Cyprus) Ltd.* v. *Satyajit Singh Majithia & others*, 2012 (128) DRJ 478, a single-judge bench decision of the High Court of Delhi and reproduced several passages from it. Dr S Muralidhar J had concluded there that "while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act."

B2. Was the Arbitration Agreement null and void, inoperative or incapable of being performed?[3]

Spentex argued that Sections 44 and 45 ACA did not apply because to come within the remit of those provisions the differences must have arisen out of legal relationships considered commercial under the law in force in India (made on or after 11 October 1960). Spentex said that an agreement between a client and a lawyer could not be considered as 'commercial' under Indian law.

Spentex cited *M.P. Electricity Board* v. *Shiv Narayan*, (2005) 7 SCC 283 a 2-judge bench decision of the Supreme Court, and *Sakharam Narayan Kherdekar* v. *City of Nagpur Corporation & Ors*., AIR 1964 Bom 200, a judgement of a single-judge of the Bombay High Court.

Nath J concluded that these two cases would have no application because their factual background was different.[4]

Nath J had earlier taken note of two judgements cited by Quinn ("In this context reference may also be had to the judgments relied upon by the learned counsel for the defendant"). He reproduced passages from these judgments in which observations had been made about the right of an advocate of recover fees [*RD Saxena*

[3] The reader should note that Quinn had filed an application under Section 45 ACA to refer the matter to the ongoing arbitration read with Order VII Rule 11, CPC to reject the plaint. Under Section 45 ACA (*post*-2019 amendments) a judicial authority must refer the matter to arbitration unless it prima facie finds that the agreement is null and void, inoperative or incapable of being performed. The court already considered the issue of maintainability and concluded that the test to be followed in an anti-arbitration suit was that of Section 45 ACA. Therefore, the enquiry of "null and void…" became relevant for both questions.

[4] Nath J noted that in *Shiv Narayan*, the question was whether the legal profession was a commercial activity. The matter was referred to a larger bench but the larger bench did not decide the case on that issue. In *Sakharam*, Nath J further noted, some officials had required registration of the office of an advocate under the Bombay Shops and Establishments Act. The court had concluded that the profession of a lawyer is not a commercial venture.

v. *Balram Prasad Sharma*, (2000) 7 SCC 264, Supreme Court and *Aditya Narayan Singh* v. *State Election Commission, Uttar Pradesh & another*, 2003 SCC OnLine All 1118]. He did not make any direct observations relating to these judgments.

Nath J referred to two Supreme Court decisions regarding the meaning of "commercial": first, *R.M. Investment and Trading Co. Pvt Ltd.* v. *Boeing Co. & Anr.*, (1994) 4 SCC 541, where the court had observed that "the expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today." Second, *New Delhi Municipal Council* v. *Sohan Lal Sachdev*, (2000) 2 SCC 494[5] where the court had said that the expressions "domestic" and "commercial" are to be given "the common parlance meaning and must be understood in their natural, ordinary and popular sense."

From this, Nath J concluded that "clearly transactions relating to services for valuable consideration would be a commercial legal relationship and would be covered by Section 44 of the Arbitration and Conciliation Act, 1996."

He then said that there was "another aspect which is quite relevant", namely, the judgments cited by Spentex "were passed keeping into account that the advocates in India are governed by a statutory regime, namely, The Advocates Act, 1961 and the rules and regulations framed thereunder." However, he noted that Quinn was "a foreign law firm not governed by the statutory regime prevailing in India relating to advocates."

Then, finally, Nath J arrived at this conclusion:

> "Essentially, the defendant has initiated arbitration proceedings for his outstanding fees. The defendant being a law firm was advising and acting for the plaintiff subsidiary. It was to be paid for the services as agreed upon. It cannot be urged that such an agreement was completely bereft of elements of commerce. The claim of the law firm is that the plaintiff have defaulted in paying its professional charges and other aspects. The claim does not relate to professional issues. As the proceedings are substantially for recovery of money, the same would tantamount to a commercial relationship as per section 45 of the Arbitration Act. Hence, the plea of thelearned counsel for the plaintiff that section 44 and 45 of the Act are not attracted is a plea without merits."

He rejected Spentex's arguments that the agreement involved payment to Quinn of contingency fees noting that it was not factually correct and, in any case, the transaction was governed by the laws of the USA. The argument that the work by Quinn was done for the subsidiary was also rejected saying it was an argument in merits.

[5] The judgment because of which *Shiv Narayan* (a case cited by Spentex) had been referred to a larger bench.